Magna Prima Construction Sdn Bhd v Bina BMK Sdn Bhd and another case

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS 24C(ARB)-10–07 OF 2014 AND 24C(ARB)-15–10 OF 2014
MARY LIM J
6 FEBRUARY 2015

Arbitration — Award — Setting aside — Application to set aside — Whether setting aside part of award can only be made under s 37(1)(a)(v) of the Arbitration Act 2005 — Test applicable under s 37(1)(a)(v) — Whether court may examine documents other than immediate award — Whether award falling outside terms of submission to arbitration — Whether arbitrator exceeded jurisdiction — Whether arbitrator erred in taking jurisdiction from submissions of parties — Arbitration Act 2005 s 37

Arbitration — Award — Question of law — Plaintiff seeking court's determination of questions of law arising out of final award — Whether legitimate question of law formulated — Whether question of law substantially affects rights of parties — Principles applicable when reviewing awards — Lack of discussion or deliberations by arbitrator when making award — Failure of arbitrator to consider applicable principles of law — Whether intervention justified — Arbitration Act 2005 s 42

Perembun (M) Sdn Bhd ('Perembun') was awarded a construction project ('the project') by the employer, Magna Park Sdn Bhd ('main contract'). By way of a joint venture agreement, Perembun and the plaintiff formed an unincorporated joint venture company called 'MPC-Perembun JV' as the main contractors to carry out the works required under the main contract for the project. MPC-Perembun JV then awarded the defendant the subcontract works for the project. During the course of the works for the project, disputes arose under the subcontract works between the parties and the defendant initiated arbitration proceedings against the plaintiff and Perembun. After the hearing, the learned arbitrator ('arbitrator') published an award where he awarded the defendant a sum of RM21,819,350.41. Subsequently, the arbitrator published a corrective award on the ground that there was a miscalculation. By the corrective award, the defendant was now awarded RM33,972,772.35. The plaintiff challenged the corrective award while the defendant sought its recognition and enforcement by entry as a judgment. The plaintiff invoked ss 37(1)(a)(iv) and/or (v) and/or 42 of the Arbitration Act 2005 ('Act 646') to set aside, either in whole or in part the award. Alternatively, the plaintiff sought to vary, remit the award to the arbitrator for

reconsideration. The plaintiff's challenge was in respect of two of the heads of claims ie loss of profits and direct payments to the defendant's subcontractors. The first issue concerned the defendant's claim of wrong payment of a sum of RM6,202,600.01 paid directly by the plaintiff to NV Bina, the defendant's subcontractor. In coming to his decision, the arbitrator found that the letter of consent was invalid. The plaintiff contended that the validity of this letter of consent was not an issue for the arbitrator's consideration in which case, the arbitrator had decided on a matter which was not submitted for his consideration. As for the award for loss of profits, the plaintiff contended that the arbitrator computed and awarded this claim based on a wrong principle. It was contended that the method used to calculate this alleged loss of profits was erroneous and not countenanced in law. Further and/or in the alternative, six questions of law were identified as arising from the findings of facts by the arbitrator as follows: (a) whether the arbitrator could make a finding that an undertaking by an employer ('Magna Park Sdn Bhd') to pay directly to a sub-subcontractor ('NV Bina') which was assented to by the defendant pursuant to an agreement dated 1 September 2005 was a void agreement when the validity or otherwise of this agreement was not one of the issues expressly reserved for consideration by the arbitral tribunal and/or whether the arbitrator has exceeded his powers in determining on the validity of the agreement dated 1 September 2005?; (b) whether the arbitrator could make a finding that there was no consideration when the defendant in fact benefited from the direct payment made to NV Bina?; (c) whether the defendant was entitled to the payment of RM6,202,600.01 when the payment had already been made to NV Bina pursuant to the agreement and/or when the defendant clearly could not show any losses it suffered as result of the payments?; (d) whether the arbitrator erred in the principles of construction not countenanced by law in respect of the agreement?; (e) whether the arbitrator had misapplied principles of law in assessing the alleged loss of the profit claimed by the defendant?; and (f) whether the arbitrator having reached illogical conclusions had clearly allowed the defendant to over claim under the arbitration?

Held, allowing the application in part with costs of RM15,000:

(1) Where the plaintiff is seeking to set aside only a part of the award, which was the case here, then sub-para 37(1(a)(iv) is not available to the plaintiff. Where the conditions of sub-para 37(1)(a)(iv) are met, the whole award will be set aside; and not just that part which is challenged; unless, the same complaints can be raised under sub-para 37(1)(a)(v) (see para 29).

(2) The tests under s 37(1)(a)(v) require the plaintiff to satisfy the court that the arbitrator had exceeded his jurisdiction and had dealt with a matter beyond his jurisdiction (see para 32).

(3) For a challenge under s 37, the court may examine documents other than the immediate award, including the points of claim and defence (see para 33).

(4) The arbitrator could not take jurisdiction from the submissions made. His jurisdiction stemmed from the appointment and from the issues submitted for consideration. The submissions cannot expand or extend the limits of jurisdiction already prescribed and agreed at the commencement of the arbitration proceedings (see para 40); *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 0793 distinguished.

(5) The arbitrator had exceeded his jurisdiction insofar as the matter of direct payments to the defendant's subcontractor was concerned. Since the arbitrator took his jurisdiction from the parties' submission to arbitration, and that would involve the letter of invocation of arbitration and the pleadings comprising the points of claim and the defence, the award in this regard contained a decision on a matter which was beyond the scope of submission to arbitration (see para 48).

(6) Of the six questions posed, the first three questions pertained to the matter of the direct payments while the last question was not a question of law but at best, a question of mixed fact and law. Such a question is not a question of law within the intent of s 42 (see para 57); *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98 referred.

(7) Applications for interventions by the court, including a s 42 application are not carte blanche exercises for the court to revisit or review the evidence presented under any pretext. If the court were to look at any evidence, it is only to that which the arbitrator has identified and has set out in his award; and not what was presented at the arbitration proceedings (see para 63); *SDA Architects v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627, at p 639 referred.

(8) The lack of discussion or deliberations on the item of loss of profits indirectly indicated and confirmed that there was no proper consideration of the relevant principles of law by the arbitrator when making this item of award. The compensatory principles provide for a recovery premised on proof of such loss and that these principles were not deployed by the arbitrator (see para 69–70).

(9) It has to be shown how the question of law 'substantially affects the rights of one or more of the parties' as required under s 42(1A). The plaintiff must explain how the arbitrator's decision on this point affects its rights; and affected those rights substantially. This is mandatorily required under s 42(1A). Since there were no claims or explanations in the

plaintiff's affidavit in support, and in the face of such mandatory requirements not being met, the court was obliged to dismiss this issue (see para 74).

(10) In the circumstances, the court only allowed the application in part, that is, the court set aside only that part of the award concerning the direct payments to the defendant's subcontractor (see para 84).

[Bahasa Malaysia summary

Perembun (M) Sdn Bhd ('Perembun') telah diawardkan satu projek pembinaan ('projek') oleh majikan, Magna Park Sdn Bhd ('kontrak utama'). Melalui satu perjanjian usahasama, Perembun dan plaintif membentuk satu syarikat usahasama yang tidak diperbadankan yang dikenali sebagai 'MPC-Perembun JV' sebagai kontraktor utama untuk melaksanakan kerja-kerja yang dikehendaki di bawah kontrak utama bagi projek. MPC-Perembun JV kemudiannya mengawardkan defendan kerja-kerja subkontrak bagi projek. Sepanjang kerja-kerja untuk projek, pertikaian timbul di bawah kerja-kerja subkontrak antara pihak-pihak dan defendan memulakan prosiding timbang tara terhadap plaintif dan Perembun. Selepas pendengaran, penimbang tara yang bijaksana ('penimbang tara') menerbitkan satu award di mana beliau mengawardkan defendan sejumlah RM21,819,350.41. Sehubungan dengan itu, penimbang tara mengawardkan award pembetulan atas alasan bahawa terdapat salah perhitungan. Melalui award pembetulan, defendan kini diawardkan RM33,972,772.35. Plaintif mencabar award pembetulan manakala defendan menuntut pengiktirafan dan penguatkuasaan melalui kemasukan penghakiman. Plaintif menggunakan s 37(1)(a)(iv) dan/atau (v) dan/atau s 42 Akta Timbangtara 2005 ('Akta 646') untuk mengetepikan, sama ada secara keseluruhannya atau sebahagian daripada award. Sebagai alternatif, plaintif menuntut untuk mengubah, meremit award kepada penimbang tara untuk dipertimbangkan semula. Cabaran plaintif adalah berkenaan dua daripada kepala tuntutan iaitu kehilangan keuntungan dan pembayaran terus kepada subkontraktor defendan. Isu pertama berkenaan tuntutan defendan untuk pembayaran salah berjumlah RM6,202,600.01 dibayar terus oleh plaintif kepada NV Bina, subkontraktor defendan. Sebelum beliau membuat keputusan, penimbang tara mendapati bahawa surat kebenaran tersebut adalah tidak sah. Plaintif menegaskan bahawa kesahihan surat kebenaran ini bukanlah satu isu untuk dipertimbangkan penimbang tara di mana, penimbang tara telah memutuskan satu perkara yang tidak dikemukakan untuk pertimbangan beliau. Bagi award untuk kehilangan keuntungan, plaintif menegaskan bahawa penimbang tara mengira dan mengawardkan tuntutan ini berdasarkan prinsip yang salah. Ditegaskan bahawa kaedah yang digunakan untuk mengira kerugian keuntungan ini adalah salah dan tidak disokong dalam undang-undang. Selanjutnya dan/atau secara alternatif, enam persoalan undang-undang telah dikenalpasti timbul daripada dapatan fakta oleh penimbang tara seperti berikut: (a) sama ada

penimbang tara boleh membuat suatu dapatan bahawa satu akujanji oleh majikan ('Magna Park Sdn Bhd') untuk membayar terus kepada sub-subkontraktor ('NV Bina') yang telah diperkenankan oleh defendan menurut satu perjanjian bertarikh 1 September 2005 adalah satu perjanjian yang tidak sah apabila kesahan atau sebaliknya perjanjian ini bukanlah salah satu daripada isu-isu yang dinyatakan untuk dipertimbangkan oleh tribunal timbang tara dan/atau sama ada penimbang tara telah melebihi bidang kuasanya dalam menentukan mengenai kesahihan perjanjian bertarikh 1 September 2005?; (b) sama ada penimbang tara boleh membuat satu dapatan yang tiada pertimbangan apabila defendan sebenarnya mendapat manfaat daripada bayaran langsung yang dibuat kepada NV Bina?; (c) sama ada defendan berhak kepada pembayaran sebanyak RM6,202,600.01 apabila pembayaran telah pun dibuat kepada NV Bina menurut perjanjian dan/atau apabila defendan secara jelas tidak dapat menunjukkan sebarang kerugian yang dialaminya akibat daripada pembayaran tersebut?; (d) sama ada penimbang tara terkhilaf dalam prinsip-prinsip pembinaan yang tidak disokong oleh undang-undang berkenaan dengan perjanjian tersebut?; (e) sama ada penimbang tara itu telah menyalahgunakan prinsip undang-undang dalam menilai kerugian keuntungan yang dikatakan dituntut oleh defendan?; dan (f) sama ada penimbang tara yang membuat kesimpulan yang tidak logik secara nyata membenarkan defendan untuk tuntutan lebih di bawah timbang tara?

Diputuskan, membenarkan sebahagian permohonan dengan kos RM15,000:

(1) Jika plaintif memohon untuk mengetepikan hanya sebahagian daripada award, yang mana berlaku di sini, maka sub-perenggan 37(1)(a)(iv) tidak terpakai kepada plaintif. Apabila syarat-syarat sub-perenggan 37(1)(a)(iv) dipenuhi, seluruh award akan diketepikan; dan bukan hanya bahagian yang dicabar; melainkan, aduan yang sama boleh dibangkitkan di bawah sub-perenggan 37(1)(a)(v) (lihat perenggan 29).

(2) Ujian di bawah s 37(1)(a)(v) memerlukan plaintif untuk memuaskan mahkamah bahawa penimbang tara telah melebihi bidang kuasanya dan mengendalikan perkara melebihi bidang kuasanya (lihat perenggan 32).

(3) Untuk cabaran di bawah s 37, mahkamah boleh meneliti dokumen-dokumen selain daripada award serta-merta, termasuk mata tuntutan dan pembelaan (lihat perenggan 33).

(4) Penimbang tara tidak boleh mengambil bidang kuasa dari penghujahan yang dibuat. Bidang kuasanya berasal daripada pelantikan tersebut dan daripada isu-isu yang dikemukakan untuk pertimbangan. Hujahan-hujahan tidak boleh berkembang atau melebihi had bidang kuasa yang telah ditetapkan dan dipersetujui pada permulaan prosiding timbang tara (lihat perenggan 40); *Taman Bandar Baru Masai v Dinding Corporation Sdn Bhd [2009] MLJU 0793* dibezakan.

(5) Penimbang tara telah melebihi bidang kuasanya setakat perkara berhubung bayaran secara langsung kepada subkontraktor defendan berkenaan. Memandangkan penimbang tara mendapat bidang kuasanya daripada hujahan pihak-pihak kepada timbang tara, dan itu akan melibatkan surat penggunaan timbang tara dan pliding yang terdiri daripada mata tuntutan dan pembelaan, award berhubung hal ini mengandungi keputusan ke atas perkara yang melebihi skop hujahan kepada timbang tara (lihat perenggan 48).

(6) Daripada enam soalan yang dikemukakan, tiga soalan pertama adalah berkenaan perkara mengenai bayaran secara langsung manakala soalan yang terakhir bukanlah persoalan undang-undang tetapi merupakan campuran persoalan fakta dan undang-undang. Soalan seperti itu bukanlah persoalan undang-undang yang terangkum dalam tujuan s 42 (lihat perenggan 57); *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd [2013] 5 MLJ 98* dirujuk.

(7) Permohonan untuk campur tangan oleh mahkamah, termasuk permohonan s 42 bukanlah latihan kekuasaan penuh bagi mahkamah untuk mengkaji semula atau mengkaji keterangan yang dikemukakan di bawah apa-apa alasan. Jika mahkamah hendak melihat mana-mana keterangan, itu hanyalah setakat apa yang dikenalpasti penimbang tara dan yang telah dinyatakan dalam award; dan bukannya apa yang telah dibentangkan pada prosiding timbang tara (lihat perenggan 63); *SDA Architects v Metro Millennium Sdn Bhd [2014] 2 MLJ 627*, pada ms 639 dirujuk.

(8) Kekurangan perbincangan atau perancangan mengenai item kehilangan keuntungan secara tidak langsung menunjukkan dan mengesahkan bahawa tiada pertimbangan yang wajar terhadap prinsip berkaitan undang-undang oleh penimbangtara apabila membuat award item ini. Prinsip-prinsip pampasan memperuntukkan bagi pemulihan berdasarkan bukti kerugian dan bahawa prinsip-prinsip ini tidak dilaksanakan oleh penimbang tara (lihat perenggan 69–70).

(9) Perlu ditunjukkan bagaimana persoalan undang-undang 'memberi kesan penting ke atas hak-hak seorang atau lebih pihak-pihak' seperti yang dikehendaki di bawah s 42(1A). Plaintif mesti menjelaskan bagaimana keputusan penimbang tara mengenai hal ini memberi kesan kepada haknya; dan menjejaskan hak-hak tersebut dengan ketara. Ini diwajibkan di bawah s 42(1A). Memandangkan tiada tuntutan atau penjelasan dalam afidavit sokongan plaintif dan berhadapan dengan keperluan mandatori yang tidak dipenuhi, mahkamah berkewajipan untuk menolak isu ini (lihat perenggan 74).

(10) Dalam keadaan tersebut, mahkamah hanya membenarkan permohonan sebahagiannya, iaitu, mahkamah mengetepikan hanya bahagian award

berhubung pembayaran terus kepada subkontraktor defendan (lihat perenggan 84).]]

Notes

For a case on question of law for award, see 1(2) *Mallal's Digest* (5th Ed, 2015) para 1872.

For cases on setting aside of award, see 1(2) *Mallal's Digest* (5th Ed, 2015) paras 1912–1990.

Cases referred to

Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd [2000] 1 SLR 749, HC (refd)

Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd [2013] 5 MLJ 98; [2013] 8 CLJ 655, HC (refd)

Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (No 2) [2004] 2 SLR 494, CA (refd)

SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627; [2014] 3 CLJ 632, CA (refd)

Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2009] MLJU 0793; [2010] 5 CLJ 83, HC (distd)

Legislation referred to

Arbitration Act 2005 ss 8, 37, 37(1)(a)(iv), (v), (3), 38, 42, 42(1A)
Arbitration Act 1996 [NZ] s 34, Sch 2, cl 5 cl 5(10)
Contracts Act 1950 s 74
Rules of Court 2012 O 69, O 69 rr 6, 6(2), (3) , 4(1)

Wilfred Abraham (Satharuban Sivasubramaniam and Aniz Amiruddin with him) (Satha & Co) of Originating Summons No 24C(ARB)-10–07 of 2014 for the plaintiff.

Chong Phow Yew (Voon Aw Kam with him) (Kamaruzaman Arif, Amran & Chong) of Originating Summons No 24C(ARB)-15–07 of 2014 for the plaintiff.

Chong Phow Yew (Voon Aw Kam with him) (Kamaruzaman Arif, Amran & Chong) of Originating Summons No 24C(ARB)-10–07 of 2014 for the defendant.

Wilfred Abraham (Satharuban Sivasubramaniam and Aniz Amiruddin with him) (Satha & Co) of Originating Summons No 24C(ARB)-15–07 of 2014 for the first defendant.

Mary Lim J:

INTRODUCTION

[1] Magna Prima Construction Sdn Bhd, the plaintiff in Originating Summons No 24C(ARB)-10–07 of 2014 seeks to invoke ss 37(1)(a)(iv) and/or (v) and/or s 42 of the Arbitration Act 2005 ('Act 646') and set aside, either in whole or in part the award dated 31 April 2014. Alternatively, the plaintiff seeks to vary, remit the award to the learned arbitrator for reconsideration. The application is opposed.

[2] In the event the plaintiff fails in its application, the defendant, Bina BMK Sdn Bhd has sought recognition of the award under Originating Summons No 24C(ARB)-15–07 of 2014. There are two defendants in this second application, Magna Prima Construction Sdn Bhd as the first defendant and Perembun (M) Sdn Bhd as the second defendant. The present proceedings are however only against the first defendant.

[3] Although proceedings under s 38 may be heard on an ex parte basis under O 69 of the Rules of Court 2012, but given the overlap in issues and that the same parties were involved the court had, during case management on 7 October 2014 decided that both applications will be heard together. More important, the parties were relying on the same affidavits. The court then directed that the related cause papers be served. The parties agreed.

[4] For purposes of consistency and ease of reference, I shall refer to 'Magna Prima Construction Sdn Bhd' as the 'plaintiff'; and 'Bina BMK Sdn Bhd' as the 'defendant'; using the details in the first originating summons.

[5] The following are the relevant affidavits:

(a) the plaintiff's first affidavit affirmed by Shahrom bin Abdul Latif on 17 June 2014;

(b) the defendant's affidavit-in-reply affirmed by Abd Aziz bin M Khalid on 16 July 2014;

(c) the plaintiff's second affidavit affirmed by Shahrom bin Abdul Latif on 4 August 2014

BACKGROUND

[6] Perembun (M) Sdn Bhd ('Perembun') was awarded a project known as 'Cadangan Pembangunan Bercampur yang mengandungi 56 unit kedai/pejabat, 567 unit tempat letak kereta dan 397 unit apartment di atas Lot 4086 dan sebahagian lot-lot (Fasa 3B(i)) di Jalan Kepong Mukim Batu, Kuala

Lumpur ('the project')' for a lump sum of RM56,361,730.40 by way of a letter of award dated 25 September 2004 by the employer, Magna Park Sdn Bhd ('main contract'). By way of a joint venture agreement dated 26 October 2004, Perembun and the plaintiff formed an unincorporated joint venture company called 'MPC-Perembun JV' as the main contractors to carry out the works required under the main contract for the project.

[7] By letter of award dated 30 October 2004, MPC-Perembun JV, awarded the defendant the subcontract works for the project for a lump sum of RM54,861,730.40. A formal contract was subsequently executed between the parties on 25 November 2005 ('subcontract').

[8] During the course of the works for the project, disputes and differences arose under the subcontract works between the parties and the defendant initiated arbitration proceedings under cl 22.0 of the conditions of contract against the plaintiff and Perembun where Ir Chong Pick Eng was appointed as the arbitrator. Pleadings filed for the arbitration consisting of the following:

(a) the defendant's points of claim dated 11 June 2008;

(b) the plaintiff's defence and counterclaim dated 30 July 2008; and

(c) the defendant's reply to the plaintiff's defence of points of claim and defence to the plaintiff's counterclaim dated 17 September 2008.

[9] The oral hearing took more than 69 days after which the learned arbitrator gave directions for written submissions to be filed by the parties as follows:

(a) the defendant's written submissions dated 15 January 2013;

(b) the plaintiff's written submissions dated 15 January 2013;

(c) the defendant's reply to the plaintiff's written submissions dated 22 February 2013; and

(d) the plaintiff's written submission in reply dated 22 February 2013.

[10] After hearing evidence and submissions, the learned arbitrator made and published the award on 9 May 2014 where he awarded the defendant inter alia a sum of RM21,819,350.41. On 27 June 2014, the learned arbitrator published a corrective award on the ground that there was a miscalculation. By the corrective award, the defendant was now awarded RM33,972,772.35.

[11] The plaintiff's challenge is on the corrective award while the defendant is looking to its recognition and enforcement by entry as a judgment.

THE CHALLENGES

[12] The plaintiff's present challenge is in respect of only two of the heads or items of claims in the corrective award; namely loss of profits and direct payments to the defendant's subcontractors.

[13] The first issue concerned the defendant's claim of wrong payment of a sum of RM6,202,600.01 paid directly by the plaintiff to NV Bina, the defendant's subcontractor. In coming to his decision and allowing this claim, the learned arbitrator agreed with the defendant that the letter of consent upon which the plaintiff was relying for the direct payment to NV Bina, the learned arbitrator found that the letter of consent was invalid for various reasons. It was the plaintiff's contention that the validity of this letter of consent was not an issue for the learned arbitrator's consideration in which case, the learned arbitrator had decided on a matter which was not submitted for his consideration. The learned arbitrator had clearly strayed outside his jurisdiction and his decision in this respect must therefore be set aside.

[14] As for the award for the sum of RM5,486,616.22 as loss of profits, it is the plaintiff's case that the learned arbitrator computed and awarded this claim based on a wrong principle. Further, it was contended that the method used to calculate this alleged loss of profits was erroneous and not countenanced in law (see para 22 of the affidavit filed in support). Instead of evaluating that claim based on the value of the outstanding work that was not done by the defendant, the learned arbitrator awarded the sum calculated on the difference between the defendant's subcontract and the defendant's own sub-subcontract sum.

[15] Even if that method was used, which the plaintiff was not subscribing to, the plaintiff claimed that the calculation would have only netted the defendant a sum of RM1.5m (difference between the plaintiff's contract with the employer ('main contract') and the plaintiff's contract with the defendant ('subcontract')); and not the sum as awarded. For these reasons, the court was invited to set aside and/or vary the award.

[16] As mentioned, the plaintiff's challenge is under ss 37 and 42 of Act 646. Specifically, the plaintiff's application is made pursuant to sub-paras 37(1)(a)(iv) and/or (v) and/or s 42 of the Arbitration Act 2005 ('Act 646'). The plaintiff claims that the award on these two matters deal with disputes not contemplated by or not falling within the terms of the submission and/or the award contains decisions on matters beyond the scope of submission to arbitration. Further and/or in the alternative, six questions of law have been identified as arising from the findings of facts by the learned arbitrator and these questions warrant a reference to this court for a determination leading to the award being set aside, in whole or in part or alternatively that the award be

varied and/or remitted back to the learned arbitrator for reconsideration.

[17] The six purported questions of law which the plaintiff has identified under s 42 of Act 646 are:

(a) whether the arbitrator can make a finding that an undertaking by an employer (Magna Park Sdn Bhd) to pay directly to a sub-subcontractor (NV Bina) which was assented to by the defendant pursuant to an agreement dated 1 September 2005 was a void agreement when the validity or otherwise of this agreement was not one of the issues expressly reserved for consideration by the arbitral tribunal and/or whether the arbitrator has exceeded its powers in determining on the validity of the agreement dated 1 October 2005?

(b) whether the arbitrator can make a finding that there was no consideration when the defendant in fact benefited from the direct payment made to NV Bina?

(c) whether the defendant is entitled to the payment of RM6,202,600.01 when the payment had already been made to NV Bina pursuant to the agreement and/or when the defendant clearly could not show any losses it suffered as result of the payments?

(d) whether the arbitrator erred in the principles of construction not countenanced by law in respect of the agreement?

(e) whether the arbitrator had misapplied principles of law in assessing the alleged loss of the profit claimed by the defendant?

(f) whether the arbitrator having reached illogical conclusions had clearly allowed the defendant to over claim under the arbitration?

[18] With the dual pronged challenge of the plaintiff, the court sought clarifications from the plaintiff as to the status of the questions. The court was advised by learned counsel that the first four questions relate to the claim of wrongful payments to the subcontractors while the last two questions relate to the claim for loss of profits although the fourth question may encompass both heads of claim.

[19] Learned counsel for the plaintiff further clarified that the award on the loss of profits is challenged under s 42 whereas the direct payments to subcontractors is challenged under s 37. The court shall deal with the questions posed in the manner as explained.

DETERMINATION

[20] The relevant provisions of Act 646 read as follow:

37 Application for setting aside

(1) An award may be set aside by the High Court only if –

(a) the party making the application provides proof that –

(i) a party to the arbitration agreement was under any incapacity;

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;

(v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;

(2) Without limiting the generality of subparagraph (1)(b)(ii), an award is in conflict with the public policy of Malaysia where –

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred –

(i) during the arbitral proceedings; or

(ii) in connection with the making of the award.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

42 Reference on questions of law

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be files within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award –

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(a) does not contain the arbitral tribunal's reasons; or

(b) does not set out the arbitral tribunal's reasons in sufficient detail.

(4)The High Court may, on the determination of a reference–

B

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

C

(d) set aside the award, in whole or in part.

(5)Where the award is varied by the High Court, the variation shall have effect as part of the arbitral tribunal's award.

D

(6) Where the award is remitted in whole or in part for reconsideration, the arbitral tribunal shall make a fresh award in respect of the matters remitted within ninety days of the date of the order for remission or such other period as the High Court may direct.

E

(7) Where the High Court makes an order under subsection (3), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from that order.

(8) On a reference under subsection (1) the High Court may–

(a) order the applicant to provide security for costs; or

F

(b) order that any money payable under the award shall be brought into the High Court or otherwise secured pending the determination of the reference.

[21] The plaintiff has pitched its case from two fronts: under s 37 which
G arguably affords a wider scope for challenge as it concerns substantially issues on jurisdiction; and under s 42 which is narrower and more restrictive by reason of the conditions in s 42 itself in that the plaintiff must not only refer questions of law which arise from the award, the plaintiff must show how those questions of law substantially affect its rights as one of the parties concerned.

H

[22] At the outset, I must say that I agree with the plaintiff that there are no reasons why the plaintiff's challenges cannot be launched on more than one platform; so long as the conditions of the appropriate provisions relied on are met. While the conditions may differ, on its own, that is no reason to dismiss
I the application in limine.

[23] Before dealing with the two substantive heads of claim there is the matter of application of sub-s 37(3). In essence, the plaintiff is inviting the court to set aside a part and not the whole of the award. Subsection (3) requires

the award or the decision to be capable of being separated: ' ... the decision on matters submitted to arbitration can be separated from those not so submitted', before the court may consider the application. Where the decision is not capable of being so separated, it is the view of the court that the application is then a non-starter. Here, the award is capable of being so separated. Accordingly, this prequalification is satisfied.

[24] The related issue that arises next is whether such an order, that is, an order setting aside only a part of the award may be made under every instance of s 37. For the purpose of this application, the relevant provisions being sub-paras 37(1)(a)(iv) and (v). Sub-para 37(1)(a)(iv) deals with a challenge on the basis that the award deals with a dispute that was not contemplated by or not falling within the terms of the submission to arbitration whereas sub-para 37(1)(a)(v) deals with an award which contains decisions on matters beyond the scope of the submission to arbitration.

[25] Learned counsel for the plaintiff submitted that sub-s 37(3) is equally applicable to both sub-paras 37(1)(a)(iv) and (v) in that the court may set aside a part of an award for either of these reasons. Learned counsel referred to the position of court intervention in New Zealand in support of his arguments.

[26] According to learned counsel, s 34 of the Arbitration Act 1996 of New Zealand is similar to our sub-paras 37(1)(a)(iv) and (v). Section 34 reads as follow:

> 34 Application for setting aside as exclusive recourse against arbitral award
>
> (1) ...
>
> (2) ...
>
> > (iii) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

[27] Learned counsel argued that the New Zealand Act had combined both the limbs found in our sub-paras 37(1)(a)(iv) and (v) under one section, allowing the court to set aside part of an award on either ground. As such, it was submitted that our sub-s (3) is equally applicable to sub-para 37(1)(a)(v).

[28] With respect, the court disagrees. As can be seen from the provisions, the legislative content of the relevant provision of the law (cl 5 in Sch 2 of the Arbitration Act 1996) is quite different from our s 37. The differences in the two pieces of legislation can only be said to be deliberate on the part of our

Parliament. In view of the express provision in sub-para 37(1)(a)(v), it is furthermore not the function of this court to read otherwise, just because that is how another jurisdiction has chosen to draft its law.

[29] In determining this issue of jurisdiction under s 37, it is also correct to say that where the plaintiff is seeking to set aside only a part of the award, which is the case here, then sub-para 37(1)(a)(iv) is not available to the plaintiff. Where the conditions of sub-para 37(1)(a)(iv) are met, the whole award will be set aside; and not just that part which is challenged; unless of course, if the same complaints can be raised under sub-para 37(1)(a)(v). This is clear from a plain reading of sub-paras 37(1)(a)(iv) and (v).

[30] Only sub-para 37(1)(a)(v) provides that it is 'subject to sub-s (3)' while sub-para 37(1)(a)(iv) is silent. As opined earlier, the absence of these critical words in sub-para 37(1)(a)(iv) is deliberate. The court must heed that clear intention of Parliament, especially in view of s 8 which reminds the court of a minimalistic approach in its intervention in arbitration and arbitration related matters.

(i) Wrongful direct payments to the subcontractors

[31] Be that as it may, the plaintiff's challenge on this issue of wrongful direct payments to the subcontractors is footed under both sub-paras 37(1)(a)(iv) and (v). Since the plaintiff's real complaint is that the learned arbitrator's decision on this issue contained a matter which went beyond the scope of what was submitted to him for determination, the proper ground should be sub-para 37(1)(a)(v). The court will therefore focus on this ground.

[32] The tests under sub-para 37(1)(a)(v) require the plaintiff to satisfy the court that the learned arbitrator had exceeded his jurisdiction and had dealt with a matter beyond his jurisdiction. For this, at the very least, the points of claim, defence and reply must be considered as these documents define the limits of the learned arbitrator's jurisdiction.

[33] In fact, for a challenge under s 37, the court may examine documents other than the immediate award, including the points of claim and defence. These are the relevant pleas in relation to the claim for wrongful direct payments to the defendant's subcontractor as found in the points of claim, defence and reply:

POINTS OF CLAIM

CLAIMANT'S LOSS AND DAMAGE

29. The Claimant avers that by reason of the Respondents' breaches of contract, neglect, interference and/or omissions in the manner as set out hereinabove and other breaches not specifically mentioned herein, and further as a result of the wrongful determination and repudiation by the Respondents, the Claimant is entitled to loss and damages as set out below.

30. The Claimant avers that the Respondents had only made payment to the Claimant in the sum of RM26,435,065.60 only by virtue of Certificate of Payments Nos 1 – 21. However, the Respondents had refused, neglected and/or failed to provide the Certificate of Payments for the Claimant's progress claims Nos 22 to 28A (Revised) (compiled herein as per Appendix E) to be issued and certified and as such failed to make payment to the Claimant pursuant to Clause 11 of the Conditions of Sub-Contract.

31. The Claimant further avers that a total of RM6,202,600.01 was at all material times wrongfully paid by the Respondents to the Claimant's sub-contractors as direct payment of which a sum RM2,316,080.16 was paid after Certificate of Payment No 21 was issued. The Claimant avers that it is entitled to this sum of RM6,202,600.01.

1st RESPONDENT'S DEFENCE TO CLAIMANT'S POINTS OF CLAIM

49. In reference to paragraph 31 of the Claimant POC, the first Respondent denies that the sum an approximate RM6,202,600.01 was due and payable to the Claimant and states that then same was paid to the sub-contractor for works done by the sub-contractor and these were direct payments due and payable of which was within the full knowledge and consent of the Claimant.

CLAIMANT'S REPLY TO 1st RESPONDENT'S DEFENCE TO POINTS OF CLAIM AND DEFENCE TO 1st RESPONDENT'S COUNTERCLAIM

58. The Claimant denies paragraph 49 of the 1st Respondent's Defence and puts then 1st Respondent to strict proof thereof.

[34] These were the issues identified and submitted for determination by the learned arbitrator:

ISSUES OF THE DISPUTES

22. The Claimant has raised five (5) issues for the consideration of this arbitral tribunal:

(a) What was the governing contract and salient terms governing the parties' conduct thereto?

(b) Whether the Respondents' purported immediate determination of the Sub-Contract vides the letter dated 28.2.2007 was lawful in accordance with the Sub-Contract.

(c) Whether the Respondent's purported conduct amounted to a wrongful repudiation of the Contract which was validly accepted by the Claimant and accordingly the Sub-Contract was properly determined on 13.3.2007?

(d) What is the amount which the Claimant is entitled to claim?

(e) Whether the first Respondent's Counterclaim is sustainable in light of the evidence given in the proceedings?

[35] There was a related issue concerning the performance bond but that is irrelevant for the purposes of this application. After citing these issues, the learned arbitrator proceeded to methodically deal with each of those issues and these are the relevant parts of the award dealing with this item of claim. They are to be found at paras 257–283:

> 257. The claimant contends that it signed the letter under economic duress on direct payment to claimant's subcontractors. Direct payment would not have been necessary if timely payments were made to the claimant by the due dates of the certificates of payments.
>
> 258. There is no provision in the subcontract for such direct payments. The agreement made on 1.9.2005 (exh 2 CWS3) by way of the letter for the direct payment between the employer and NV Bina Sdn Bhd ('NV Bina') is unenforceable as it was not properly supported by consideration.
>
> 259. The claimant further maintains that it was forced by financial reasons into 'agreeing' to payments made directly to its subcontractors and others. Claimant submits that as claimant's consent was not voluntary but due to economic duress, the consent thus made is invalid.
>
> 260. The claimant further submits that the payments were made by others, a third party and not the respondents. As such the deductions on account of direct payments must be paid to the claimant. The respondents could seek their recourse elsewhere.
>
> 261. Claimant provides authorities to support its contentions agreement made under economic duress is void and was applied by the Malaysian courts.
>
> 262. 1R contends however that direct payments to claimant's subcontractors do not prejudice claimant. In fact it helped claimant to expedite the progress of the construction works.
>
> 263. Claimant's subcontractor, NV Bina, requested direct payment from the employer relying on the letter of 1.9.2005 (48 CB1) which was

reflected in employer's letter dated 13.10.2006 (44–45 R1B(A)) to the claimant and NV Bina. 1R stated that the claimant is now stopped from raising this issue.

264. However the claimant maintains that there is no provision in the subcontract for such direct payment. It also maintains that the fact and evidence on any purported agreement was carried out under economic duress is void. Besides it is not supported by any consideration on the purported agreement. This is invalid and ineffective.

265. I FIND the whole argument allowing direct payments direct payment from the employer is centred on the letter of 1.9.2005.

266. The letter is an agreement made between the employer and the claimant's subcontractor, NV Bina.

267. Upon careful reading and consideration of the whole content of the letter, I FIND this letter was endorsed with the signatures from the representatives of the respondents, the claimant and NV Bina on the direct payments is indeed an agreement entered into between the parties. It is my considered opinion that it is in substance an agreement.

268. It is trite that agreement without consideration is void unless one of the three conditions is fulfilled as provided in s 26 of the Contract Act 1950. These are as follows:

26. Agreement without consideration, void, unless –

An agreement made without consideration is void, unless –

(a) It is in writing and registered. It is expressed in writing and registered under the law (if any for a time being in force for registration of such documents, and is ...

(b) Or is a promise to compensate for something done; It is a promise to compensate, wholly or in part, a person who has voluntarily done something for the promisor, or something which the promisor was legally compellable to do so; or

(c) Or is a promise to pay a debt barred by limitation law, It is a promise ...

269. There is no evidence of consideration moving from the promisee to the promisor. In the absence of such consideration the agreement is void unless it falls under one of the three exceptions under s 26 of the Contract Act.

270. The meaning of a consideration is stated in 9(1) of the *Halsbury Law of England* (4th Ed), Reissue 1998, para 728. I extract the passage as follows:

... Thus, a consideration for a promise may consist in either some benefit conferred on the promisor, or detriment suffered by the promisee, or both. On the other hand, that benefit or detriment can only amount to consideration sufficient to support a binding promise where it is casually link to that promise ...

271. Applying the above principle on this case, I FIND, firstly I am unable to see any benefit conferred on the promisor, the employer or detriment suffered by the promisee, NV Bina. Secondly and more important is that there is no causal link to that promise between the two. NV Bina being a sub-subcontractor has no causal link with the employer. In short there is no privity of contract between both the two. I HOLD that agreement is void.

272. In the alternative, another important factor is whether or not the consent of a party in entering into an agreement is given voluntarily.

273. When this agreement was made and endorsed on 1.9.2005, the overdue payment sum was already accumulating and stood at RM2,019,628.33. (Item 9 127 CB3).

274. Starting from certificate No 5 certified on 04.5.2005, the outstanding payment sum of RM1,847,960.37 was not settled until eight days later. Subsequently prior to 1.9.2005 delayed outstanding payments continue to accumulate. Instalment and erratic payments started to occur.

275. I FIND with this scenario on payment owed and not yet settled would put the claimant under financial pressure to manage its cash flow. It is my considered opinion that there was economic duress when claimant was given the letter of 1.9.2005 to endorse signifying his agreement to the proposed direct payment to NV Bina.

276. Because the outstanding payment amount of RM4,226,126.77 due on certificates Nos 6, 7, 8 and 9, NV Bina applied to the employer on 19.4.2006 (4 CB8) pursuant to the letter of 1 September 2005 for direct payment citing the inability of the claimant to pay and settle this amount.

277. The claimant responded on 27.4.2006 (104 CB1) taking exception to the letter of the same date from NV Bina for direct payment. It is protesting against direct payment. The main thrust of this letter, the claimant contends, among others, the problem arises (on direct payment) was because the claimant was not paid timely on the due dates by the respondents according to the payment terms stipulated in the subcontract.

278. The claimant also was of the view that this letter of undertaking (1.9.2005 agreement) for the direct payment issued earlier was construed as a letter of comfort from the employer to NV Bina. The claimant concluded by stating that it did not agree and wish to register its protest to hereby object to any direct payment.

279. Further the claimant sent another letter dated 2.5.2006 (108 CB1) to the employer elaborating on the payment issue and registered its protest again on the direct payment to NV Bina.

280. From the above evidence I FIND there is no voluntary consent from the claimant to enter into this agreement pursuant to the letter of 1.9.2005. It is my considered opinion therefore claimant did not voluntarily consent to such scheme and consequently the agreement of 1.9.2005 is invalid and ineffective.

281. Premised upon the aforesaid findings and reasoning, I HOLD the claimant is entitled to claim the amount of RM6,202,600.01 which was wrongly paid directly to the subcontractors.

282. In summary the claimant is entitled to claim:

Items	Particulars	RM	RM
A	Value of work done and materials on site as at 1.3.2007		
	(a) Amount of Works Done	37,823,055.39	
	(b) Total values Variation Works materials	2,356,369.75	
	(c) Value of Materials on site	1,004,809.70	41,184,234.84
B	(1) Contractual Claims		
	(a) Loss and Expense	1,606,091.30	
	(b) Additional Finance Costs	1,122,842.99	
	(c) Loss of Profit due Wrongful Termination	5,486,616.22	
	(d) Value of Equipment & Machinery	393,581.10	
	(e) Rental of Equipment and Machinery	68,035.51	
	(2) Amount Wrongly Paid Direct to Sub-Contractors	6,202,600.01	14,879,767.12
	Subtotal:		56,064,001.96
C	Less: Previous Payments:		
	(a) Amount Paid to Claimant	(16,893,667.74)	
	(b) Total Materials supplied o/b Claimant, Sub-Contractor (incl. All administrative charges)	(5,654,878.01)	(22,548,545.75)
D	TOTAL AMOUNT CLAIM ENTITLED TO CLAIM		33,515,456.21

283. After taking into consideration the additions and deductions of values various heads of claims, a decision was arrived at that the claimant is entitled to claim for a value of RM33,515,456.21.

[36] It is quite apparent from the above terms of the award that the learned arbitrator had allowed the plaintiff's direct payments to the defendant's subcontractors was invalid for several reasons. Amongst those reasons was the matter of a lack of consideration; the other which is under scrutiny here, that there was economic duress when the defendant issued the pertinent letter of 1 September 2005 signifying its agreement of direct payment to the subcontractor.

[37] From the pleaded case before the learned arbitrator, the parties' respective positions were plain to see: the plaintiff had alleged that the sum of

RM6,202,600.01 was not due because there were authorised direct payments to the defendant's subcontractor. The defendant's response was similarly simple and clear: it denied that there was such an arrangement and it required proof. Learned counsel for the defendant has suggested that this denial relates to the matter of consent whereupon it was open to the defendant to deal with the lack of consent by reason of the presence of vitiating factors such as economic duress.

[38] With respect, the court disagrees. The plea of denial and putting the other side to strict proof requires the party making the claim to strictly prove what is asserted, and that is there is full knowledge and consent. That is vastly different from a positive assertion that the agreement is invalid or that the consent which appears in the letter of authorisation is not voluntary or that the consent is vitiated for one reason or other. Here, because of economic duress.

[39] It is not the validity of the agreement for direct payment to the subcontractor which was under consideration but the matter of its existence. That is quite apparent from the pleadings identified.

[40] Further, the learned arbitrator does not and cannot be said to take jurisdiction from the submissions made. His jurisdiction stems from the appointment and from the issues submitted for consideration. The submissions merely serve to advocate a collated and correlated order of the oral and documentary evidence presented in relation to the pleaded case, and support those submissions and conclusions reached or drawn as being proper and in accord with principles of law as expounded in case authorities. The submissions cannot expand or extend the limits of jurisdiction already prescribed and agreed at the commencement of the arbitration proceedings. To suggest otherwise would be to run the risk of causing havoc to arbitration and what the related proceedings signify.

[41] In this regard, I must point out that the situation in *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 0793; [2010] 5 CLJ 83 was quite different. Although Justice Hamid Sultan had remarked about the arbitrators having a 'general jurisdiction to deal with all matters relating to the dispute and this will cover incidental matters'; those remarks must be understood to be made in relation to the arbitration agreement. While the arbitrator may have jurisdiction to deal with matters which are incidental to the main subject matter, the fact remains that the arbitrator's jurisdiction is defined by what the parties may have referred for determination. Where the parties have chosen not to refer certain aspects of their dispute to arbitration, and parties are perfectly free and entitled to do so for whatever reason they may or may not have, the arbitrator cannot turn round to claim and insist on jurisdiction to hear any particular aspect of the dispute.

[42] In any case, I have examined the submissions made and it is quite clear that the matter is in fact raised in the submissions. In its submissions, the defendant addressed this matter as part of 'Issue 4' at p 488, under para 6 at p 492:

> 6. Payment wrongfully paid to the Claimant's Sub-Contractor
>
> The Claimant further submits that a total of RM6,202,600.01 was at all material times wrongfully paid by the Respondents to the Claimant's sub-contractors as direct payment of which a sum RM2,316,080.16 was paid after Certificate of Payment No 21 was issued and that is entitled to the sum of RM6,202,600.01.
>
> The Claimant submits that it had not agreed to direct payments to its sub-contractor. The evidence had established that at all material times, that the direct payments to NV Bina started at a very late stage. The facts show that there were no direct payments until discussions relating to novation arose. Ir Aziz had pointed out that there was economic duress made by the Respondents and that as such, any agreement on direct payment (if any) to NV Bina was invalid.
>
> The Claimant submits that the direct payment clause used in Magna Park's letter of undertaking dated 1/9/2005 CWS3 (NKH) Exhibit 2 was only valid if the Claimant did not pay NV Bina and not in a situation where the Employer did not pay the Respondents and in turn the Claimant. It must be emphasized that there was no direct payment provision in the sub-contract and the alleged agreement to direct payment was not supported by consideration and accordingly owing to the economic duress imposed on the Claimant it is invalid and unlawful.
>
> On the issues pertaining to novation and economic duress it must be pointed out that Dato Rizal's involvement and promises were spoken of by En Zulkafli, Ir Ng and Ir Adrian Tan. Mr Chong had given evidence on this point on the contras and RM1.6 million (see letter at CB1 page 160). Dato Rizal only gave a bare denial on cross-examination.
>
> Be that as it may, it was confirmed by Ir Ng that the Employer also did not pay NV Bina in accordance to the undertaking and that NV Bina had taken up a winding-up petition against the Employer.
>
> The law has recognized that commercial pressure may constitute pressure which can render a contract voidable.
>
> His Lordship, Lord Scarman in Privy Council case in *Pao On v Lau Yiu Long* stated inter alia:
>
> > Recently two English judges have recognized that commercial pressure may constitute duress the pressure of which can render a contract voidable. Kerr J in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293 and Mocatta J in *North Ocen Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705. Both stressed that the pressure must be such that the victim's consent to the contract was not a voluntary act on his part. In their Lordships' view, there is nothing contrary to principle in recognizing economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.

The principles on economic duress had been further endorsed in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd and another The Atlantic Baron* [1978] 3All ER 1170 (see no 10 of BA) and in The Supreme Court in *Emar Sdn Bhd (under receivership) v Aidigi Sdn Bhd and another appeal* [1991] 2 MLJ 734 (see no 14 of BA).

In this particular case, the above facts had shown first that direct payments to NV Bina was not a term incorporated in the sub-contract COC. Until the new management involving Steven Lee and Dato Rizal came into the picture there were no direct payments to NV Bina. It is clear from the evidence given that the Claimant was forced for financial reasons into 'agreeing to payments being made to their sub-contractor and others'. As such based on the law the Claimant submits that any Agreement for direct payment must be voided as the Claimant's consent was not voluntary but due to economic duress. Further, the Claimant submits that the Claimant were not made by the Respondents but by other i.e third parties and as such, the deductions on account of direct payments must be paid to the Claimant and the Respondents to seek recourse elsewhere.

The Claimant further refers to the cases of *Lian Mong Yee v Abdul Rashid bin Maidin & Ors* [2001] 4 MLJ 38 (No 11 of BA) and *OCBC Securities (MELAKA) Sdn Bhd (formerly known as Sykt Tan, Chow & Loh Securities Sdn Bhd) v Koh Kee Huat* [2004] 2 MLJ 110 (No 13 of BA) on the principles of economic duress applied in the Malaysian Courts.

[43] The plaintiff had addressed this matter of the direct payments to the subcontractor at paras 58 and 59 which are to be read together with paras 16–18 – see p 633 as follow:

(2) Amount Wrongfully Paid Direct to Sub-Contractor – RM6,202,600.01

58. The Respondents refer to paragraphs 16–18 above and submit that the Claimant's claim under this heading is totally without basis and it should form part of the payment paid to the Claimant.

59. Therefore based on the above, the Claimant's claim for the sum of RM34,520,882.29 should be dismissed as the amount lack accuracy and credibility.

Direct Procurement of Building Material by first Respondent on behalf of Claimant

16. Furthermore based on the above letter which was signed by the Claimant and NV Bina, it is clearly stated that 'All costs related to the procurement of materials shall then be deducted from Bina BMK Sdn Bhd'. As such, the Respondents are rightly entitled to charge administration fee on top of the costs for the materials.

Direct Payment to the Claimant's Sub-Contractor

17. First of all, this particular issue is a non-issue, as the Claimant will be prejudice in any event by the direct payment by Magna Park to the sub-contractor namely NV Bina. In fact, it expedites the progress of the Project which was for the benefit of everyone including the Claimant.

18. Furthermore, NV Bina in reliance of an undertaking letter from Magna Park to NV Bina dated 1.9.2005 (CB1 pg 48) which was agreed by the Claimant, had requested for a direct payment from Magna Park. In addition, the Claimant's consent on the direct payment was also reflected in a letter from Magna Park to the Claimant and NV Bina dated 13.10.2006 (R1B(A) pg 44–45) whereby the Claimant agreed on the split payment and authorized NV Bina to deal directly with the Respondents in relation to the completion of the Project.

19. As such, the Claimant should be estopped from raising this issue at all.

[44] To this, the defendant then replied at para (T) under the heading of amount wrongfully paid direct to subcontractor (see p 651):

The Claimant replies that its position on economic duress as set out in the Claimant's Submission stands and the Respondent had not, in its evidence and submission shown otherwise.

There was no question of 'lacking accuracy' as the sum of RM6,202,600.01 is admitted to in the Respondents' records. This figure can be found at the statement from the first Respondent R1B(B1) viz. Statement from Accounts Dept as shown at page 4.

The breakdown of the amount paid to others is listed as follows:–

(i) NV Bina is RM4,935,074.01

(ii) Bond M&E Sdn Bhd is RM280,000.00

(iii) NV Bina is RM987,526.00 (contra of property)

The total amount of the above items (I), (ii) and (iii) adds up to RM6,202,600.01 (see Exhibit C) attached herewith – pencilled markings is done by the Claimant to show the workings). This tallies with the Claimant's Statement of Final Claim at CB3 Appendix G Previous Payment to BMK sub-contractors pages 241 to 244 (see Exhibit D attached herewith – the total of RM6,202,600.01 is highlighted in yellow at page 244).

Accordingly, the Claimant replies that the first Respondent's statement that the amount lacked accuracy is totally spurious when its own records had come out with exactly the same figures.

[45] It is quite obvious that the parties started to deal with this issue of economic duress for the first time in their respective submissions. It is the view of the court that that in no way confers jurisdiction on the learned arbitrator.

[46] Further, an examination of the dispute between the parties reveals that there were some allegations of interference by the plaintiff in relation to the procurement contracts. To these allegations, the plaintiff had pleaded in first respondent's defence to the claimant's point of claim:

Paragraph 22.4 of the claimant's POC is denied by the first respondent as although there were variation orders issued by the architect and quantity surveyors, the claimant had never carried out such variation orders. The plaintiff puts the burden of proof on the claimant to justify and support their allegations therein.

32. Paragraphs 22.5 and 22.6 if the claimant's POC is denied by the first respondent. The first respondent avers that the decision to allow the employer to purchase the raw materials was done with the consent of the claimant. As such, there was no interference as alleged by the claimant. Further, the claimant had through their own negligence and conduct caused numerous delays for the purchase of orders for raw materials by mismanagement of on-site stocks of raw materials and thereby issuing short notices for the purchase of raw materials.

33. Furthermore, the offer to take over the purchase and supply of raw materials was done by the employer to assist the financial predicament of the claimant due to the claimant's failure to manage its own finances and any delay, if any was due to the late placing of orders by the claimant.

[47] These were the responses of the defendant:

34. Claimant denies paras 31, 32 and 33 of the first respondent's defence and states that the first respondent's averments are misconceived and mischievous and at all times, the respondents themselves had admitted to delays in payment albeit allegedly 'reasonable' and 'common practice in the industry'.

35. The claimant states that the first respondent and the employer had fallen out with the second respondent and in point of fact, the first respondent and Magna Prima Bhd ie the listed parent company had been sued jointly by the second respondent for monies outstanding under the joint venture agreement dated 27 October 2004 vide Kuala Lumpur High Court Suit No S7–22–711 of 2006. A copy of the writ of summons dated 21 July 2006 and statement of claim dated 17 July 2006 of the said Kuala Lumpur High Court Suit No S7–22–711 of 2006 is attached hereto as exh C15.

36. The claimant further states that at all material times, the alleged offer to take over the purchase and supply of material from the employer and the direct dealings by the first respondent with the employer was engineered to take 'economic advantage' of the claimant particulars of which shall be adduced at the hearing and the claimant states that any consent (which is denied) was given under economic duress.

[48] As can be seen from the pleadings and the documents before the learned arbitrator, the issue of economic duress was not raised by the defendant in response to this matter of direct payment to the subcontractor. The issue of economic duress vitiating any consent that may have been given by the defendant was actually raised in relation to the matter of interference by the

plaintiff on the procurement contracts and not, in relation to these direct payments. It is the view of this court that the contents of the award clearly illustrate that the learned arbitrator has indeed exceeded his jurisdiction insofar as the matter of direct payments to the defendant's subcontractor is concerned. The learned arbitrator has clearly mixed up his understanding of the facts and pleaded issues for his consideration. Since the learned arbitrator takes his jurisdiction from the parties' submission to arbitration, and that would involve the letter of invocation of arbitration and the pleadings comprising the points of claim and the defence, the plaintiff is right in its assertion that the award in this regard contains a decision on a matter which is beyond the scope of submission to arbitration.

[49] I must add that while the issue of economic duress may have been raised in relation to the procurement contracts, that is quite different from saying that it also applies to the matter of direct payments to the subcontractor. That argument cannot be extended in the way that the learned arbitrator did without exceeding his jurisdiction. The learned arbitrator's decision on this is clearly outside the terms of submission. For this reason alone, this part of the award must be set aside.

(ii) Loss of profits

[50] Moving next to the issue of the loss of profit. For this, it is reasonable to say that the challenge is properly under s 42 and not s 37. This is evident from the grounds relied on by the plaintiff – see paras (f) to (i) of the originating summons.

[51] Although the plaintiff had stated at para (j), that the award should be set aside on the ground that it deals with disputes not contemplated by or not falling with the terms of the submission to arbitration and/or the award contains decisions on matters beyond the scope of the submission to arbitration, the plaintiff's complaint about the award on the loss of profits is from the point of its computation, and not the right to the claim. The plaintiff is really challenging the principle(s) relied upon or applied by the learned arbitrator. Furthermore, while the plaintiff has submitted that the last two questions are the relevant questions of law, it would appear that it is only the fifth question posed that may be considered as a true question of law.

[52] What is a question of law? This term is not defined in Act 646. However, some light may be shed by examining the position under New Zealand's Arbitration Act of 1996; and some case law. Sub-clause 5(10) of Sch 2 to that Act defines a question of law in the following terms:

(10) For the purposes of this clause, question of law–

(a) includes an error of law that involves an incorrect interpretation of the applicable law (whether or not the error appears on the record of the decision); but

(b) does not include any question as to whether–

(i) the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; and

(ii) the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

[53] In the Singapore decision of *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [2000] 1 SLR 749 GP Selvam JC defined a 'question of law' as follow:

> A question of law means a point of law in controversy which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. The point of law must substantially affect the rights of one or more of the parties to the arbitration. If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. An application for leave to appeal on the ground that the appeal invokes a question of law must therefore clearly present the question of law on which the court's opinion is sought and should also show that it concerns a term of the contract or an event which is not a one-off term or event: see *The Nema; Pioneer Shipping v BTP Tioxide* [1982] AC 724.

[54] This view was approved by the Court of Appeal of Singapore in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (No 2)* [2004] 2 SLR 494. At p 499, the Court of Appeal opined:

> To our mind, a 'question of law' must necessarily be a finding which the parties dispute, that requires the guidance of the court to resolve. Where an arbitrator does not apply a principle of law correctly, that failure is a mere 'error of law' (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

[55] I am of the view that these interpretations and general principles (sub-cl 5(10) of Sch 2 of the New Zealand Act) may be referred to in order to understand what a question of law under our s 42 is. From these cases and legislation, it may therefore be said that a question of law refers to 'a point of law in controversy' which requires the opinion or determination of this court. Such question will include one where there is an incorrect interpretation of the applicable law. It, however, will not include any question as to whether the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; or whether the arbitral tribunal drew the correct factual inferences from the relevant primary facts.

[56] Most important, the identified question of law must be a real and legitimate question of law and not a question of fact 'dressed up' as a question of law. There have been frequent enough reminders that the court should restrain from interfering and substituting for the arbitrator's findings, its own views and findings. This reminder comes from the recognition of party autonomy and choices in their dispute resolution mechanisms regardless how obviously wrong findings of facts may be (except of course where the findings are truly irrational or bizarre) or even the scale of the financial consequences of the mistake of fact might be. The court should always be vigilant to guard against challenges of findings of facts dressed up as questions of law.

[57] Applying these guiding principles, it may be said that of the six questions posed, the first three questions pertain to the matter of the direct payments while the last question is not a question of law but at best, a question of mixed fact and law. Such a question is not a question of law within the intent of s 42 – see *Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98; [2013] 8 CLJ 655 in relation to the applicable principles. There is no need for me to deal with the first three questions since the matter of the direct payments has already been dealt with under s 37. For the purpose of the plaintiff's complaint on the award for loss of profits, it is the fourth and fifth questions which are relevant. Here, the complaint is that the learned arbitrator had applied principles of law which are not countenanced in law.

[58] As questions of law, these questions do meet the requirements as discussed earlier in that the questions relate to 'a point of law in controversy' and the opinion or determination of this court is required. The questions are not moot or academic as they are valid questions.

[59] It is perhaps helpful to first have a look at the defendant's claim for loss of profits. This can be found at Appendix F which is referred to in the award at para 239 as 'pp 131–240 CB3' – see p 759 of the plaintiff's affidavit in support:

A

Rev.200907

Project : CADANGAN PEMBANGUNAN BERCAMPUR YANG MENGANDUNGI 56 UNIT KEDAI/PEJABAT, 567 UNIT TEMPAT LETAK KERETA & 397 UNIT APARTMENT DI ATAS LOT 4086 DAN SEBAHAGIAN LOT-LOT (FASA 3B(i)), DI JALAN KEPONG MUKIM BATU, KUALA LUMPUR

B

LOSS OF PROFIT DUE TO WRONGFUL DETERMINATION OF CONTRACT

A	BMK's Contract Sum	- RM		54,891,730.40	
	ADD				
B	Variation Works				
1)	Increase in Gross Floor Area (GFA) between contract Drawings and construction drawings (Attachment A)	RM	995,648.70		
2)	Increase in Floor Height between contract Drawings and construction drawings (Attachment B)	RM	1,149,489.40		
3)	Additional Doors, Ironmongery, Window & Vents Between contract drawings and construction drawings (Attachment C)	RM	1,702,118.43	3,847,256.53	
	Less				
C	Cost Of Works				
1.1	Piling and Pilecap Works final Sub-Contract Sum (Recompile) (Attachment D)	- RM	(4,878,600.45)		
1.2	Building Works Sub-Contract Sum (Exclude P.C. & Provisional Sums) (NV Bina) (Attachment E)	- RM	(44,714,305.42)	(49,592,905.87)	
	Cost of Works not included in the above Sub-Contracts				
2.1	General Building and M&E Signages (Attachment F)		(61,141.00)		
2.2	Centralised aluminium post boxes (Follow contract amount)		(14,686.45)		
2.3	Landscaping Works (Attachment G)		(97,970.00)		
2.4	Refuse handling System (Attachment G)		(280,240.00)		
2.5	Sanitary Fittings and Accessories (Attachment J)		(360,409.00)	(814,736.45)	
	Total Profit Entitlement	**RM**			**8,301,344.61**
	Total Payment Received by BMK To date (Attachment K)	- RM		16,893,667.74	
	Less				
1)	Payment made to Piling and Pilecap Sub-contractor To date (Attachment L)	- RM	(4,661,774.23)		
2)	Payment Made to Building Works Sub-contractor To date (Attachment M)	- RM	(9,806,714.97)	(14,468,489.10)	
	Total Profit Realised To-date	**RM**			2,425,178.64
	PROJECTED LOSS OF PROFIT	RM			5,876,165.97

C

D

E

F

G

H

I

[60] These are the relevant parts of the award on the defendant's claim for loss of profit: A

Contractual Claims: (C) Loss of Profit due to Wrongful Determination of Employment(paras 230–241)

230. Claimant contends that CW1 computed the Loss of Profits amount of RM5,876,165.97 is due to wrongful determination of the Claimant's employment. The amount is based on the difference between the Claimant's Sub-Contract Sum and the Claimant's Sub-Sub-Contract Sum. B

231. The Claimant further contends that its claims have been verified by Expert Witness while the Respondents did not call any expert witness to rebut CW1's evidence. Claimant further added that the 1R did not even call the registered QS for ARH, Sr Bahruddin to rebut Claimant's claims. C

232. IR merely states that since the Claimant did not complete the works on 31.10.2006 and with the absence of EOT, the Claimant's claim under this head of claims is without basis. D

233. However, the Claimant maintains that it is entitled to its claim as the Claimant has accepted Respondent's wrongful repudiation of the contract and put the sub-contract to an end. The Claimant further cited authorities to support its claim for consequential losses. E

234. There was no direct response from 1R on Sr Bahruddin registered QS from ARH not called as witness to give his testimony to rebut Claimant's claim figures. 1R only contends that it is not necessary to call Sr Bahruddin as witness because his expert opinion is not required. R1W4's evidence is more relevant as he was on the site. F

235. Sr Bahruddin's evidence is more reliable and independence as compared with those given by RW4 who at the material times was an employee of 1R. R1W4 admitted in his testimony that he did not include the values of the VO works in the recommendation for payment certificates as he was being instructed by the 1R. G

236. 1R also justifies its decision for not calling the witness Mr Wong Thiam Fook who signed a number of letters one of which is on the determination of Claimant's employment, stating that it does not matter who writes the letter for the fact that the letter was sent out on the determination of Claimant's employment. H

237. Mr Wong who signed and issued the letter to determine the Claimant's employment is an important witness. Evidences could have been adduced from Mr Wong Thiam Fook on the circumstances of writing those letters and on other issues. I

238. I FIND and HOLD that the contentions why these two important witnesses were not called to testify are without merit and are dismissed.

239. As there are no evidence adduced by the 1R to rebut the Claimant's claims for Loss and Profit details of which the claim are shown at pages (131–240), I have to consider whether or not the claim of RM 5,876,165.97 is fair to the parties. This amount is calculated as 10.71% of the total contract sum of the Claimant's sub-contract. This was arrived at by the differences between this sub-contract and the sub-sub-contract sums.

240. It is my considered opinion the percentage of profit of a sub-contract sum for this size and costs of the Project is reasonable and fair. However I suggest reducing it by rounding up the percentage to 10% which is a more reasonable figure. I FIND the amount of RM5,486,616.229 for the Loss of Profit is reasonable and fair to both the parties.

241. Premised upon the reasoning and finding, I HOLD that the Claimant is entitled to claim for loss and profit for a sum of RM 5,486,616.22.

[61] The plaintiff takes the position that the correct principle of law on the right to a claim for loss of profits is calculated by reference to the balance of the outstanding works and the defendant's proof of loss. The principle of computation is not by a simple calculation of the difference between the defendant's contract price with the plaintiff; and the defendant's subcontract price with its subcontractor, which is what the learned arbitrator did in this case.

[62] In response, the defendant argued that the learned arbitrator had in fact relied on the principle as suggested by the plaintiff and this is evident from the workings of the defendant's witness, CW1 (Sr Tony Thang Boon Eng). According to the defendant, CW1 had calculated the defendant's loss of profit of RM5,876,165.97 based on the value of the outstanding uncompleted work; and not the difference between the two contract values. What had happened was that because there was no rebuttal evidence from the plaintiff on the claim, the learned arbitrator was of the view that the sum claimed was fair considering that it amounted to about 10% of the contract price. The defendant invited the court to look at CW1's evidence. The defendant had urged the court to examine the evidence that was led to prove during the arbitration proceedings to show that the learned arbitrator and the defendant's witness CW1 had in fact applied the correct principles.

[63] The court must decline. Applications for interventions by the court, including a s 42 application, cannot be and are not, carte blanche exercises for

the court to revisit or review the evidence presented under any pretext. If the court were to look at any evidence, it is only to that which the learned arbitrator has identified and has set out in his award; and not what was presented at the arbitration proceedings. To do otherwise would be to run afoul of the fundamental principle that the arbitrators are the final arbiters of the facts.

[64] In the recent Court of Appeal's decision in *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627; [2014] 3 CLJ 632, at p 639, the Court of Appeal had commented that for s 42 to be properly invoked, 'the question referred to the High Court must be a proper and valid question of law'. Justice Mohd Hishamudin recognised that in order to determine whether a particular question raised is a proper and valid question of law or not requires the court to consider 'the propriety of the question that is proposed in the context of the facts of the case as a whole, including the issues that have to be dealt with by the arbitrator'.

[65] For the matter to be properly before the court, it must be borne in mind that s 42 questions of law cannot emanate from the arbitration or the arbitration proceedings but from the award. The challenge is restricted to the four corners of the award and nothing else. The court cannot and should not examine any other evidence save for the award, or what was mentioned in the award.

[66] Now, coming back to the award on this item of claim, it is actually unclear what principle was applied by the learned arbitrator when allowing this head of claim. While at para 239 of the award, the learned arbitrator had said that he had to ' ... consider whether or not the claim of RM 5,876,165.97 is fair to the parties', he had also said that 'This amount is calculated as 10.71% of the total contract sum of the claimant's subcontract'. Then, almost immediately in the next breath; the learned arbitrator went on to say that 'This was arrived at by the differences between this subcontract and the sub-subcontract sums'. At para 240, the learned arbitrator proceeded to offer his 'considered opinion' that a 10% profit margin was 'fair and reasonable' given the size and value of the contract. He then rounded up the profit margin to 10% of the contract price and accordingly made the award.

[67] From Appendix F, it is apparent how the defendant makes its claim of RM5.8m as its loss of profits. Appendix F shows that the defendant had actually targeted a profit of over RM8m from the whole contract – 'total profit entitlement'; the precise amount is RM8,301,344.61. Because the defendant had already received a sum of RM2,425,178.64 from the plaintiff (total profit realised to-date), it was now claiming the balance sum of over RM5.8m.

[68] Assuming for a moment that the broad 10% margin was the basis of this item in the award, it presumably must have been based on industry practice. There was however, no explanation or evidence to that effect or how the learned arbitrator could say that that is the correct applicable principle. I must add that even if profits are assessed or measured by reference to a percentage of a subcontract (which it is not), and that 10% profit is 'reasonable and fair' given 'the size and costs of this project', it is clear that the learned arbitrator did not even apply his own understanding of how loss of profits are to be assessed. The defendant's targeted profit of RM8,301,344.61 is certainly well over 10% of the total subcontract sum. It would appear that the methodology or principle, if any, used by the learned arbitrator is almost non-existent in which case the plaintiff's argument that the 'principle' applied was not one that is countenanced in law, is correct.

[69] Further, the lack of discussion or deliberations on this item of claim indirectly indicates and confirms that there was no proper consideration of the relevant principles of law by the learned arbitrator when making this item of award. Clearly, there is every basis for the plaintiff to make its case that the learned arbitrator had applied the principle of evaluating a claim for loss of profits based on the difference between the two contracts: the plaintiff's contract with the employer and the plaintiff's subcontract with the defendant.

[70] On the matter of applicable principles for calculating and awarding a claim for loss of profits, I agree with the plaintiff that the compensatory principles provide for a recovery premised on proof of such loss and that these principles were not deployed by the learned arbitrator.

[71] A claim for any item of damage including a loss of profits must always be subject to proof. According to *Hudson's Building and Engineering Contracts* ((11th Ed), Vol 1, 1995 at p 1070), *'establishing a claim for loss of profit on uncompleted work following a contractor's rescission or termination may not be practical'*. Amongst the reasons are that contractors such as the defendant would have to prove the adequacy of its *'original estimating and pricing of the cost of the contract'*. For this, *'considerable ingenuity and differential weighting of prices of earlier work may have been deployed to secure a financing element known as 'front-loading'. If so, the prices for the later remaining stages of the work may well be uneconomical even in a contract which is profitable overall'. The calculation of profits is however, not based on 'any profit percentage used in pricing'.*

[72] Furthermore, the state of the accounts at the time of termination of contract is critical. *Hudson's Building and Engineering Contracts* also acknowledged that *'the calculations and evidence to establish a claim for loss of profit on a discontinued contract, in contrast to the simpler claim for the full contract value of the work done up to the time of termination, plus any damages*

relating to the work, may be complicated and difficult. They will involve deducting from the notional contract value of the whole project if completed (a) all sums previously paid, and (b) the estimated cost to the contractor of completing the unfinished work, in order to determine if any further sum by way of profit can be recovered'.

[73] In short, the defendant must establish that its contract price for the remaining work which was now lost to the defendant or the uncompleted work by reason of the termination, would in fact have been profitable. It is not a case of whether the sum claimed is 'fair to the parties'; it is a case of whether the sum is proved according to the general principles of compensation. I would add that the general principles of compensation as found in s 74 of the Contracts Act 1950 would apply; and there is no evidence that these time-tested principles have been considered for this item of claim. There is also the requirement that there must be evidence of mitigation. Again, the court cannot find any consideration of this anywhere in the award.

[74] Be that as it may, the problem remains that for the court to entertain this question, it must be shown how the question of law 'substantially affects the rights of one or more of the parties' as required under sub-s 42(1A). The plaintiff must explain how the learned arbitrator's decision on this point affects its rights; and affected those rights substantially. This is a mandatorily required under s 42(1A). Without such a claim and explanation, the court has no discretion but to dismiss the application for this complaint.

[75] The plaintiff's affidavit is deafeningly silent on this. Learned counsel for the plaintiff submitted that this requirement under s 42(1A) did not have to be met by way of affidavit evidence nor was there a need to aver to that effect. According to learned counsel, it is also self-evident that because the award included this item of loss, the plaintiff's right is necessarily or obviously affected. Next, the amount at stake logically implies that substantial rights have been affected. Learned counsel added that the arguments under s 42(1A) are also matters that can be explained from the Bar and in the course of submissions.

[76] With respect, the court disagrees. This is what sub-s 42(1A) state:

> (1A) The High Court *shall dismiss* a reference made under subsection (1) *unless the question of law substantially affects the rights of one or more of the parties*.(Emphasis added.)

[77] Sub-section 42(1A) is couched in very strong mandatory and directory terms; the court shall or is obliged to dismiss the reference unless the plaintiff can show that 'the question of law substantially affects the rights of one or more of the parties'. There is no discretion given to the court if there is no proof of

how such rights are said to be affected. It is the view of this court that this provision must be strictly complied with before the reference under s 42 and the reliefs sought are available to the plaintiff applicant.

[78] In order that the court may evaluate whether the plaintiff's rights are indeed affected, there must first and foremost be a claim that there is such a condition. Then, there must be an explanation as to how and in what manner or extent that identified right be affected, substantially. All this can only be done by way of averments in an affidavit, with explanations from the deponent as to which party's right is affected; how that right is affected; and the extent to which that right is affected such that a claim of being affected substantially may be said to have been fulfilled.

[79] Although the 'right' that is claimed to be affected and affected substantially is frequently financial in nature, that may not be the case here. Even if it was, there must be explanations as to how the element of substantiality is met. Again, that is frequently done by explanations or illustrations of the figures or values involved. This can be seen from the decision of *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR 494, the Court of Appeal opined that:

> ... The question as to how 'substantially' was to be measured, remained. Whether a claim was substantial or not can sometimes be considered in absolute terms. We could arbitrarily say that $10 is insubstantial. There will come a point where one might not be able to declare confidently that the given sum is substantial or otherwise, without considering the context of the claim ... In *The Evimera* [1982] 1 Lloyd's Rep 55, the court was of the view that the claim for $20,000 was not substantial in the context of that case ... We agree with the court in The Evimera that the granting of leave is a discretionary exercise and as such, is not governed by rules, provided that the statutory criteria are satisfied ... The question of substantiality is largely a matter of discretion at case.

[80] There is no such claim let alone even a claim or averment by the plaintiff that any of its rights have been affected, substantially or at all; in the affidavit filed in support of this application. It is my view that a claim that a right has been affected and affected substantially is necessarily one grounded on facts. Certainly, it starts with a claim by the plaintiff that there is such effect on its rights. Evidence must be proffered showing precisely what right has been affected; and how that right has been affected. More importantly, the plaintiff must show how that right is 'substantially' affected.

[81] There is indirect support on this reading from O 69 r 6 of the Rules of Court 2012; in particular sub-rr (2) and (3) which read as follow:

> (2) In every application for reference of a question of law under section 42 of the

2005 Act the originating summons shall, in addition to the matters stated in rule 4(1) – A

(a) identify the question of law arising out of the award which is sought to be determined;

(b) state the grounds on which reference is sought; and B

(c) give particulars of each ground on which it is contended that the arbitral tribunal erred in law, with references to the paragraphs or passages of the award where each alleged error is to be found.

(3) The applicant shall file by affidavit, written evidence on which he intends to rely when he files his originating summons, including a copy of the arbitration agreement and the award. C

[82] Furthermore, r 4(1), inter alia, provides that the originating summons shall '(b) state the grounds in support of the originating summons'; and '(c) show that any statutory requirements have been met'. I cannot see how the plaintiff can ever 'show' that the statutory requirements of s 42(1A) have been met if both the originating summons and the supporting affidavit are silent on these critical matters. D

[83] Since there are no claims or explanations in the plaintiff's affidavit in support, and in the face of such mandatory requirements not being met, the court is obliged to dismiss this issue, regardless how it may view the question of law. E

[84] In the circumstances, the court will only allow the application in part, that is, the court will set aside only that part of the award concerning the direct payments to the defendant's subcontractor. The final award dated 21 April 2014 and the correction award dated 27 June 2014 is hereby varied to the sum of RM27,770,172.34 save as to costs and the varied award is hereby recognised as binding and be enforced by entry as a judgment against the plaintiff. The court further orders the sum of RM15,000 as suitable costs to the plaintiff. F G

Application allowed in part with costs RM15,000.

Reported by Kanesh Sundrum H

I